IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

NTP, INC.,	)	
Plaintiff,	)	
v.	)	**Civil Action No. 3:07cv549JRS**
CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS,	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF VERIZON WIRELESS' MOTION TO STAY

Defendant Cellco Partnership d/b/a Verizon Wireless ("Verizon Wireless"), by counsel, states the following in support of its motion to stay this action pending the conclusion of all proceedings, including appeals, arising out of the United States Patent and Trademark Office's ("PTO") reexamination of the patents asserted against Verizon Wireless by Plaintiff NTP, Inc. ("NTP").

INTRODUCTION

"It would be a painful tragedy – for everyone involved – if this litigation were allowed to move forward during the PTO's reexamination, only to be rendered meaningless by that agency's final action." *NTP, Inc. v. Palm, Inc.*, Civ. Action No. 3:06CV836, slip. op. at 5 (E.D.Va. March 22, 2007) (Spencer, J.) (attached as Ex. 1). With those words, the Court stayed NTP's patent infringement lawsuit against wireless equipment manufacturer Palm, Inc. ("Palm") earlier this year. Now the Court is faced with a yet another NTP suit, this time against wireless provider Verizon Wireless. No meaningful distinction can be made between these two cases,

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and the consequences of allowing this suit to proceed before final resolution of the reexaminations would be equally tragic.

In fact, upon receiving the Complaint, counsel for Verizon Wireless contacted NTP's counsel in an effort to reach agreement on a stay pending completion of the current PTO proceedings. Surprisingly, notwithstanding the Court's decision in the *Palm* case, and despite NTP's acknowledgement that all of the claims of the patents-in-suit have now been held to be unpatentable at the examiner level at the PTO, NTP failed to respond to this request, thereby forcing Verizon Wireless to bring the instant motion.

To be clear, NTP has now sued Verizon Wireless for patent infringement long after three different senior examiners at the PTO have declared that NTP's patents-in-suit never should have issued. NTP's Complaint freely acknowledges that "[t]he PTO rejected all of the claims of the Patents-in-Suit." Compl. ¶ 31. Today, NTP is continuing the uphill climb of appealing to the PTO's Board of Patent Appeals and Interferences ("BPAI") from those rejections by the examiners.

As in *Palm*, NTP's claims will be moot if the BPAI affirms the examiners' rejections of NTP's claims. Each and every claim identified in NTP's complaint against Verizon Wireless has been rejected and affirmation of those rejections will end this case. Moreover, even if the rejections were somehow reversed in whole or in part on appeal, the appellate rulings will focus the issues in the case, thereby conserving judicial resources. Some patents or claims may be eliminated entirely; some claims may be narrowed; new claims may be added; and any remaining patents will have been analyzed keenly through the reexamination and appeals process. This Court would benefit from that analysis.

As in *Palm*, NTP will not be prejudiced by a stay. NTP's alleged injuries, if any, are fully compensable by money damages. *See, e.g. MercExchange LLC v. eBay Inc.,* __ F. Supp.2d __, 2007 WL 2172587, *9 (E.D. Va. Jul. 27, 2007) (citing patentee's willingness to license the infringer as evidence that money, as opposed to injunction, could have adequately compensated the patentee); *see also Paice LLC v. Toyota Motor Corp.,* 2006 WL 2385139, *5 (E.D. Tex. Aug. 16, 2006) (citing patentee's offer to license infringer as demonstrating the adequacy of monetary relief from patentee's point of view). And, in these early stages of the case – Verizon Wireless' responsive pleadings will not be due for some time yet – NTP cannot have made a substantial investment in this case that would be disrupted by a stay. Thus, this case is unlike NTP's litigation against Research in Motion, Ltd. ("RIM") where RIM moved for a stay only ***after*** an adverse jury verdict. *See NTP, Inc. v. Research In Motion, Ltd.*, 397 F. Supp. 2d 785 (E.D. Va. 2005) (Spencer, J.).

As in *Palm*, a refusal to stay the case would greatly harm the defendant. Allowing this case to proceed would expose Verizon Wireless to substantial expense — both in terms of legal fees, expert witness fees, and the resources of its management — all to defend a suit that, at present, appears to have no legal basis whatsoever. A stay is the appropriate response.

Just as it stayed NTP's suit against Palm, this Court should stay this action pending the outcome of those proceedings, including any further appeals.

FACTUAL BACKGROUND

NTP filed this suit on September 7, 2007, contending that Verizon Wireless' products and services infringe one or more claims of each of NTP's eight patents-in-suit.[1] Long before

[1] U.S. Patent No. 5,436,960 ("the '960 patent"); U.S. Patent No. 5,438,611 ("the '611 patent"); U.S. Patent No. 5,625,670 ("the '670 patent"); U.S. Patent No. 5,819,172 ("the '172 patent"); U.S. Patent No. 6,067,451 ("the '451 patent"); U.S. Patent No. 6,317,592 ("the '592

NTP sued Verizon Wireless, however, PTO examiners already had determined that the claims that NTP has asserted here are unpatentable; all of those claims have been rejected in final office actions by the PTO.

The PTO itself initiated reexamination of five of the patents-in-suit (the '670, '172, '451, '592 and '946 patents) in 2002. NTP requested reexamination of a sixth patent (the '611 patents) in 2003. Additionally, a third-party requested *ex parte* reexamination of the seventh and eighth patents (the '960 and '472 patents) in 2003. Ex. 2 (excerpts from reexamination files).

In February 2006, the PTO issued final office actions rejecting the pending claims of the '960 patent (claims 1-89, 183-193, 195-233) and the pending claims of the '451 patent (claims 1-341, 393-437). Ex. 3 (excerpts from reexamination files). The Examiners determined that these claims were anticipated and/or obvious based upon at least four pre-existing printed publications. At that time, the PTO also rejected all 764 of the pending claims in the '592 patent and issued an Office Action closing prosecution in the *inter partes* reexamination. Ex. 4 (excerpts from reexamination files). On August 22, 2006, the PTO issued final rejections of all the pending claims of the '172, '670, '611 and '472 patents. Ex. 5 (excerpts from reexamination files). Again, at least four pre-existing printed publications formed the basis for the PTO's decision that NTP was not the first to invent its patent claims. That same month, the PTO issued a final office action rejecting all the pending claims of the '946 patent (claims 1-185 and 288-333). Ex. 6 (excerpts from reexamination files). The Examiner determined that these claims were

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patent"); U.S. Patent No. 5,479,472 ("the '472 patent"); and U.S. Patent No. 5,631,946 ("the '946 patent") (collectively, the "patents-in-suit").

anticipated and/or obvious based upon at least ten pieces of prior art, and furthermore, failed to comply with the written description requirement of 35 U.S.C. § 112.[2]

In each instance, NTP has challenged the PTO's rejections in appeals to the PTO's BPAI. The following chart demonstrates the status of those appeals:

Count	Patent	Final Rejection	Appeal Brief Filed	Examiner's Answer Mailed
I	'960	02/24/06	06/26/06	09/10/07
II	'611	08/22/06	12/21/06	09/05/07
III	'670	08/22/06	12/21/06	08/30/07
IV	'172	08/22/06	12/21/06	08/30/07
V	'451	02/22/06	06/26/06	08/20/07 08/24/07
VI	'592	02/01/06	06/07/07	08/20/07 08/24/07
VII	'472	08/22/06	12/19/06	09/04/07
VIII	'946	08/22/06	12/19/06	08/30/07

Ex. 7 (excerpts from reexamination files). If those appeals fail, NTP has the right to appeal to the Court of Appeals for the Federal Circuit.

Of the eight patents-in-suit, seven were asserted against Palm, in a case now stayed in this Court. Five of the eight patents-in-suit – the '670, '172, '451, '592 and '960 patents – were fully litigated in *RIM*. Compl. ¶¶ 24-26. However, the PTO's rejections of those patents

[2] The sheer breadth and strength of these rejections strongly supports a stay. *See Middleton, Inc. v. Minn. Mining & Mfg. Co.*, No. 4:03-CV-40493, 2004 WL 1968669 (S.D. Iowa Aug. 24, 2004) (granting stay pending reexamination and noting that "the Court is influenced by the breadth of the reexamination and the number of prior art references under active review").

(indeed, all the patents-in-suit) were based largely on prior art references that were not subject to trial on the merits in *RIM*. *See*, *e.g.,* Ex. 8 (Nov. 30, 2005, Decision Denying Petition, '592 Reexamination Proceedings), at 4.

ARGUMENT

I. A STAY SHOULD BE GRANTED PENDING FINAL RESOLUTION OF THE REEXAMINATION OF THE PATENTS IN SUIT.

The reexamination process allows any person to request that the PTO reexamine or reevaluate an unexpired U.S. patent whose patentability is "doubtful." *In re Etter*, 756 F.2d 852, 857 (Fed. Cir. 1985) (*en banc*); 35 U.S.C. §§ 301-307. The process was established to provide for the "efficient resolution of questions about the validity of issued patents without recourse to expensive and lengthy infringement litigation." H.R. Rep. No. 96-1307 at 2-3 (1980), *reprinted in* 1980 U.S.C.C.A.N., at 6460, 6462-63 (1980).

Congress anticipated that, to facilitate this goal, courts would stay litigation pending patent reexamination. In fact, as the Federal Circuit has observed, early versions of the reexamination statute "expressly provided for a stay of court proceedings during reexamination." *Gould v. Control Laser Corp.*, 705 F.2d 1340, 1342 (Fed. Cir. 1983) (citations omitted). Congress deemed an express stay provision unnecessary, however, because a federal court has "inherent power to manage [its] dockets and stay proceedings … including the authority to order a stay pending conclusion of a PTO reexamination." *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1426-27 (Fed. Cir. 1988). In fact, the stay of pending litigation to enable the PTO to review contested patents was one of the specified purposes of the reexamination legislation. *See Patlex Corp. v. Mossinghoff*, 758 F.2d 594, 606 (Fed. Cir. 1985), *modified, aff'd in part, rev'd in part on other grounds on rehearing*, 771 F.2d 480 (Fed. Cir. 1985).

In ruling on motions to stay, courts consider "(1) whether a stay would unduly prejudice or present a clear tactical disadvantage to the non-moving party; (2) whether a stay will simplify the issues in question and trial of the case; and (3) whether discovery is complete and whether a trial date has been set." *Microstrategy Inc. v. Business Objects SA*, No. 2:01cv826, slip op. at 4 (E.D. Va. June 12, 2002) (Friedman, J) (granting stay) (Ex. 9); *see also Tap Pharm. Prods., Inc. v. Atrix Labs., Inc.*, 70 U.S.P.Q.2d 1319, 1320 (N.D. Ill. 2004); *Target Therapeutics, Inc. v. Scimed Life Sys., Inc.*, 33 U.S.P.Q.2d 2022, 2023 (N.D. Cal. 1995). The decision to stay legal proceedings pending reexamination therefore rests with the sound discretion of the court. *Gould*, 705 F.2d at 1341-42. In exercising this discretion, courts have recognized "that there is a liberal policy in favor of granting motions to stay proceedings pending the outcome of USPTO reexamination … proceedings." *ASCII Corp. v. STD Entm't USA, Inc.*, 844 F. Supp. 1378, 1381 (N.D. Cal. 1994); *Ingro v. Tyco Indus., Inc.*, 227 U.S.P.Q. 69, 71 (N.D. Ill. 1985) ("legislative history indicates Congress … approved of courts liberally granting stays within their discretion."); *see also Gould*, 705 F.2d at 1342 (affirming stay because "[w]hen a district court stays patent validity proceedings before it until completion of a reexamination proceeding, that stay must be accepted *if the purpose of the reexamination statute is to be preserved*") (emphasis added).

The Court followed precisely this path in *Palm.* First observing its natural authority to stay litigation, Ex. 1, slip. op at 4, the Court noted that, while Palm had answered the Complaint and discovery had commenced, the case was still in the early stages of discovery and no trial date had been set. *Id.* at 4-5. The Court noted the "significant benefits to staying this matter until the validity of the patents-in-suit may be established," since the reexamination process might entirely obviate the need for further litigation. *Id.* at 5. Alternatively, said the Court, if NTP were to prevail, "the parties and the Court will have the PTO's expert opinion regarding the scope and validity of the patent claims . . . and both will be in a better position to assess the issues raised in this civil action." *Id.* (citation omitted).[3] While it expressed some sympathy to NTP's argument that a stay would deny it the chance to enjoin further alleged infringement, the Court balanced that against "the fair possibility that the PTO will determine [NTP's] claims to be unenforceable," concluding that "a stay [was] necessary to avoid further and improvident expenditure of time and resources." *Id.* at 6.

A. The PTO's Rejection Of The Asserted Claims Strongly Favors A Stay.

1. The PTO's Rejection Of The Asserted Claims As Invalid Raises Powerful Practical Reasons Favoring A Stay.

Palm dictates the same result here.

First, if the rejections are upheld on appeal, this case will be subject to immediate termination. The expense and drain of this case on resources need never take place. That alone is sufficient reason to stay this litigation pending the conclusion of the reexamination procedures. "There is simply no reason to justify the maintenance and expense of this action during the pendency of an examination whose resolution could summarily resolve these matters." *Palm*, Ex. 1, slip op. at 6; *see also Ethicon,* 849 F.2d at 1426 ("One purpose of the reexamination procedure is to eliminate trial of [the patent validity] issue (when the claim is canceled) ….") *quoting*

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[3] The decisions of other courts are in harmony with the Court's decision in *Palm*. *See, e.g.*, *Methode Elecs., Inc. v. Infineon Techs. Corp.*, No. C99-21142, 2000 U.S. Dist. LEXIS 20689 (N.D. Cal. Aug. 7, 2000) (granting stay, reexamination underway before lawsuit initiated; motion to stay brought without delay); *Tap Pharm. Prods.*, 70 U.S.P.Q.2d 1319 (granting stay, requests for reexamination were granted before the instant suit was filed); *Target Therapeutics, Inc.*, 33 U.S.P.Q.2d at 2024 (granting stay, no prejudice to patentee because reexamination request had been filed months before the lawsuit); *Hewlett-Packard Co. v. Acuson Corp.*, No. C-93-0808, 1993 WL 149994 at *2 (N.D. Cal. May 5, 1993) (granting stay because "HP did not seek to enforce its patent until after Acuson had filed its Request for Reexamination").

Gould, 705 F.2d at 1342; *In re Cygnus Telecomms. Tech., LLC*, 385 F. Supp. 2d 1022, 1023 (N.D. Cal. 2005) (same); *San Giacomo N.A. v. Pilliod Furniture*, No. 2:95-CV-00739, 1996 U.S. Dist. LEXIS 14440, *3 (M.D.N.C. August 13, 1996) ("The *primary* purpose of the reexamination procedure is to eliminate trial of [the patent validity] issue (when the patent is canceled) ….") (emphasis added).

Moreover, even if any claims do survive the reexamination proceedings, they may be substantially narrowed (or completely new). Hence, if this case were to proceed, the parties would be shooting at a moving target: whatever analysis NTP or Verizon Wireless may conduct regarding the claims presently at issue may well be moot and the claims that it may actually face at trial may only come into existence after discovery has concluded (requiring reopening of the pretrial proceedings). These risks are extinguished by a stay.

2. The PTO's Rejections Raise Substantial Issues Of Comity That Militate In Favor Of A Stay.

When the PTO determines during reexamination that claims of a patent are unpatentable, basic principles of administrative law and comity argue in favor of permitting the completion of that process before further litigation proceeds in the district court, regardless of the fact that NTP has appealed the examiners' decisions to the BPAI. *See, e.g.*, *Canady v. Erbe Elektromedizin GmbH,* 271 F. Supp. 2d 64, 75 (D.D.C. 2002). In *Canady*, the district court declined to lift a stay of litigation pending reexamination. The PTO had already issued an office action rejecting certain claims as unpatentable during the first reexamination, and two additional requests for reexamination were still ongoing. "[W]here issues require technical expertise and that expertise is available through an administrative agency, the court should allow that agency to come to a final determination before rendering a decision on that issue." *Id.* at 75; *see also ASCII Corp.*, 844 F. Supp. at 1380 ("Congress enacted the [USPTO] reexamination procedure to provide an inexpensive, expedient means of determining patent validity which, if available and practical, should be deferred to by the courts.") (citing *Digital Magnetic Sys., Inc. v. Ansley*, 213 U.S.P.Q. 290 (W.D. Okla. 1982)).

B. A Stay Will Conserve Judicial Resources — Even If The Rejections Are Reversed.

Even if the examiners' rejections of the claims are reversed in part – or even entirely – the efficiencies to be gained by a stay of this litigation are substantial.

As the Court acknowledged in *Palm*, there is at least a "fair possibility" that NTP's patents will not be revived on appeal, but even if they are, they will likely be changed substantively. *See Microstrategy*, Ex. 9, slip op. at 4 (given that 70% of patents undergoing reexamination have some claims amended or cancelled, "the likelihood that there will be some changes to the claims is more probable than not.") If the rejections are partially reversed, then invalidation of even *some* of the patents would substantially narrow the case and save resources. As the court in *Teradyne* observed: "Since the reexamination process may narrow and perhaps eliminate issues concerning the patents' validity, the court should not expend unnecessary judicial resources by trying to resolve these claims now." *Teradyne, Inc. v. Hewlett-Packard* Co., No. C-91-0344, 1993 U.S. Dist. LEXIS 14601, *23 (N.D. Cal. Jan. 7, 1993).

And, as this Court noted in *Palm*, both the parties and the Court would benefit from the PTO's expert opinion on the scope and validity of any claims that actually do manage to survive the reexamination process. *Palm*, Ex. 1, slip op. at 5; *see also EchoStar Techs., Corp. v. TiVo, Inc.*, No. 5:05-CV-00081, 2006 U.S. Dist. LEXIS 48431, *4-5 (E.D. Tex. July 14, 2006) (citing *Fisher Controls Co. v. Control Components, Inc.*, 443 F. Supp. 581, 582 (S.D. Iowa 1977) (listing factors regarding the streamlining of post-stay litigation that militate in favor of a stay)); *accord Emhart Indus., Inc. v. Sankyo Seiki Mfg. Co.*, 3 U.S.P.Q.2d 1889, 1890 (N.D. Ill. 1987);

GPAC, Inc. v. D.W.W. Enters., Inc., 144 F.R.D. 60, 63 (D.N.J. 1992); *see also In re Etter*, 756 F.2d at 857 (noting that "an auxiliary function of reexamination is to free the court from any need to consider prior art without the benefit of the PTO's initial consideration).

C. A Stay Will Not Prejudice NTP.

NTP will not be prejudiced by a stay pending reexamination. It has preserved whatever rights and remedies it may have against Verizon Wireless by filing this case. Having done that, NTP has no need for expedition. If NTP prevails both in the reexamination process and at trial, it will be fully compensated for any delays. *See, e.g.*, *Patlex*, 758 F.2d at 603 (if patents upheld on reexamination, the patent owner can recover damages from those who have infringed his patent during reexamination); *Microstrategy*, Ex. 9, slip op. at 5 (since plaintiff's injury could be fully redressed by damages, plaintiff would not be prejudiced by a stay lasting as long as four years).[4]

In *Palm,* the Court stayed NTP's suit even though discovery had commenced, noting that the case was still in its early stages. Similarly, in *Tap Pharmaceutical Products*, the court granted defendant's motion to stay, finding that the plaintiff would not be unduly prejudiced where the discovery had yet to commence. *Tap Pharm. Prods., Inc.*, 70 U.S.P.Q.2d at 1320; *see also Target Therapeutics, Inc.*, 33 U.S.P.Q.2d at 2023 (concluding an absence of prejudice to the non-moving party because "[t]he parties have not engaged in expensive discovery and no trial date has been set."); *Microstrategy*, Ex. 9, slip op. at 8 (lack of substantive discovery and dispositive motions weighed in favor of granting stay, even though trial date was only four months away); *ASCII Corp.*, 844 F. Supp. at 1381 (granting a stay pending reexamination when "the parties are in the initial stages of the lawsuit and have undertaken little or no discovery" and "the case has not been set for trial").

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[4] Note, however, that if the claims are substantially amended, NTP's right to damages for infringement would only run from the time the patent reissues after examination. *Microstrategy*, slip op. at 5. Under these circumstances, not only will a stay not prejudice NTP (since NTP would have no prior right to damages), but a stay would also ensure that any damages awarded to NTP are calculated correctly the first time.

Here, Verizon Wireless has brought its stay request *even before it has to answer*. In these circumstances, even more so than in the other cases cited, NTP simply cannot have invested substantial time in this case.

Even if there were prejudice to NTP (and there is not), NTP is not in a position to complain. Though Verizon Wireless' accused products and services have been on the market for several years, Compl. ¶ 33-40 (identifying, with varying degrees of specificity, accused products and services), and though NTP claims to have notified Verizon Wireless about its alleged patent rights more than eight years ago, Compl. ¶ 41, NTP chose not to sue Verizon Wireless until long after patent examiners had issued final rejections of NTP's patent claims. Nothing prevented NTP from bringing suit at an earlier date. Having waited until after the rejection of the claims by the patent examiners – nearly five years after the initiation of these reexaminations, and more than a full year after every final rejection – NTP should accept the consequences of its tactical decision to file suit only at this late juncture.

Finally, awaiting the resolution of all appeals of the reexamination proceedings will not unduly delay the resolution of this litigation. By statute, "[a]ll reexamination proceedings under this section, including any appeal to the Board of Patent Appeals and Interferences, will be conducted with special dispatch." 35 U.S.C. § 305. When the patents under reexamination are involved in litigation, they will have priority over all other cases, including other reexaminations and reissues not in litigation. Manual of Patent Examining Procedures ("MPEP") § 2261 (available at www.uspto.gov/web/offices/pac/mpep/mpep.htm). When litigation is stayed pending the outcome of the reexamination, all proceedings will be further expedited to the extent possible. MPEP § 2686.04. *See also Canady,* 271 F. Supp. 2d at 76 ("[W]here litigation is stayed pending a decision by the PTO, reexamination proceedings will be expedited to the extent possible.").

D. Failing To Stay The Case Would Prejudice Verizon Wireless.

By stark contrast, Verizon Wireless would suffer immeasurable harm if this litigation were allowed to proceed. If this case goes forward, Verizon Wireless will have to expend substantial time and resources defending itself against allegations of infringement of patent claims that the PTO has already determined are unpatentable. A stay of litigation pending resolution of all appeals of the reexamination proceedings will conserve the resources of the Court – and both parties – and is appropriate for the reasons discussed above.

The monetary costs to Verizon to defend itself in this litigation will be substantial. This year, the average estimated cost of defending a patent infringement suit in the Eastern District of Virginia (with alleged damages over $25 million) is $6.96 million. *Am. Intell. Prop. L. Ass'n*, 2007 Report of the Economic Survey, I-91 (2007) (excerpts attached as Ex. 10).[5] And, those costs are purely monetary, and fail to reflect the additional expenses and time commitments to corporate executives and engineers surrounding major patent litigation.

CONCLUSION

For the foregoing reasons, Verizon Wireless respectfully requests that the Court grant its motion to stay this litigation pending resolution of the patent reexamination proceedings, including all appeals therefrom.

[5] The Eastern District of Virginia falls under the category of "Other East" on the chart attached as Ex. 10.

Dated: September 14, 2007

Respectfully submitted,

CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS

By Counsel

_/s/______________________________
Richard Cullen, VSB #16765
rcullen@mcguirewoods.com
Brian C. Riopelle, VSB #36454
briopelle@mcguirewoods.com
Robert M. Tyler, VSB #37861
rtyler@mcguirewoods.com
David E. Finkelson, VSB #44059
dfinkelson@mcguirewoods.com
McGuireWoods LLP
Attorneys for Cellco Partnership d/b/a
Verizon Wireless
One James Center
901 East Cary Street
Richmond, VA 23219
Telephone: 804.776.1000
Facsimile: 804.775.1061

Charles B. Molster, III, VSB # 23613
cmolster@winston.com
Winston & Strawn LLP
Attorney for Cellco Partnership d/b/a
Verizon Wireless
1700 K Street, NW
Washington, DC 20006
Telephone: 202.282.5988
Facsimile: 202.282.5100

Dan K. Webb (*pro hac vice pending)*
dwebb@winston.com
Peter C. McCabe (*pro hac vice pending)*
pmccabe@winston.com
Winston & Strawn LLP
Attorney for Cellco Partnership d/b/a
Verizon Wireless
35 West Wacker Drive
Chicago, Illinois 60601
Telephone: 312.558.5600
Facsimile: 312.558.5700

Counsel for Cellco Partnership d/b/a Verizon Wireless

CERTIFICATE OF SERVICE

I certify that on September 14, 2007, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Craig T. Merritt
Henry I. Willett, III
Nichole B. Vanderslice
Christian & Barton LLP
909 E Main Street, Suite 1200
Richmond, VA 23219-3095

I certify that I will mail the document by first class mail to the following non-filing users:

Peter A. Sullivan
Ronald Abramson
Jessica Feldman
Hughes Hubbard & Reed LLP
One Battery Park Plaza
New York, NY 10004

Greg Williams
Hughes Hubbard & Reed LLP
1775 I Street, NW
Washington, DC 20006

/s/___________________________
Brian C. Riopelle (VSB No. 36454)
Attorney for Cellco Partnership d/b/a
Verizon Wireless